No. 386

Supreme Court of the United States

OCTOBER TERM, 1942

OLUF BORUP, *et al.*, seamen on board the American Whale Factory Ship "ULYSSES",

Petitioners,

against

American Whale Factory Ship "ULYSSES", her engines, boilers, tackle, apparel, furniture, etc., and WESTERN OPERATING CORPORATION, Owner, and H. M. MIKKELSEN, Master,

Respondents.

REPLY BRIEF

LYMAN STANSKY,
Proctor for Petitioners.

HERBERT LEBOVICI,
Proctor for Petitioners.

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REPLY BRIEF

This brief is submitted solely in reply to respondents' Point B, commencing on page 12 of the respondents' brief, submitted in opposition to the petition for a writ of certiorari.

This Point B seeks to establish that no alternative method of performance existed.

It is the purpose of this memorandum to take issue with this contention which was not adverted to in our main brief.

At the outset, it should be noted that the petitioners did not concede, as it might be supposed from the first sentence of respondents' Point B, that performance of the contract of employment, as written, was frustrated by the Presiden-

tial Proclamation. At best, it is our contention that performance of one alternative may have been frustrated, leaving one or more possible methods of performance available to the respondents.

The respondents contend here that they could not discharge the seamen in New York or in the United States, because of the provisions of Title 8, U. S. C. A., Section 168, quoted by them on page 13 of their brief. Before disputing this contention, it may be noted that neither the District Court nor the Circuit Court accepted the respondents' argument that the respondents were precluded by Section 168 from paying the seamen or from discharging them here. On the contrary, the finding of the District Court, with respect to the notices of detention served upon the Master by the Immigration Authorities, was as follows (1046)*:

> "These notices (of detainer) duplicated notices which had been given to the master by the Immigration Service April 27 at New Orleans. *They did not alter the rights or obligations of libelants or respondents under the September 1939 contracts.*" (Italics ours.)

Furthermore, it may be pointed out that the final decree of the District Court itself provided (1084):

> "* * * all libelants shall pack up and leave said vessel."

In adverting to this statement of the District Court, respondents make a statement, not entirely supported by

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* References are to folios of the printed record.

the record, as to why they were ordered discharged by the decree, but possibly could not have been discharged prior thereto.

However, it must be noted by the Court that the men could either be discharged or they could not. There is nothing in the record to indicate any change of legal circumstance, which would not have permitted the men to be discharged prior to the decree, and that permitted them to be discharged after the decree of the District Court. What would have been illegal before, could obviously not have been made otherwise by the Court.

With respect to the alleged restrictions which, it is claimed, Title 8, U. S. C. A., Section 168, laid upon the respondents, it is important to note that there is nothing therein contained, as there is nothing elsewhere, *that prevents an employer from indicating clearly and unequivocally to the employee that the relationship of employer and employee is severed (discharge) as of any specific date and which prevents the payment to the employee of that which is due.* The section merely prevents a steamship company from *landing ashore* (the statute says "paying *off*") such a seaman, and from thereafter disclaiming such responsibility for him as is imposed by the Immigration laws of the United States. It may be that by virtue of the provisions of Section 168, the employer, after having terminated the relationship and after having paid the employee, might be required to retain him on board. This, however, would not constitute the frustration or impossibility of performance of that provision of the petitioners' contract, which provides (Libelants' Exhibit II, 56; see also 443 and 1018):

> "1. Wages run from and including the day of entering the service until discharge occurs;"

Furthermore, it may be noted that rule 7, sub-division H, paragraph 3, of the Immigration Rules and Regulations of January 1, 1930, then in effect—regulations made pursuant to the provisions of the statute—provided as follows:

> "Alien seamen ordered detained on board or deported pursuant to Section 20(a) of the Immigration Act of 1924 shall not be removed to immigration stations or other places for safekeeping, except in cases of emergency, and in such cases only when the master, agent, owner, charterer, or consignee of the vessel involved shall give satisfactory guaranty that all costs of such removal, including maintenance charges and damage done by such seamen to the station or place to which removed, including damage to equipment, shall be paid by such master, agent, owner, charterer, or consignee."

Pursuant to the regulation, therefore, even conceding that Section 168 might have prevented in the first instance the separation of the petitioners from the vessel after the service of notices of detainer, a matter which we have already contended was not a bar to the payment of the seamen's wages, it appears that the remedy for taking the seamen off the vessel was available. It is true that the record states that at New York (419) "efforts were made by respondent with United States authorities to have the libelants transferred ashore, to be maintained at its expense at Ellis Island, * * *". But the reason for the fail-

ure of this consummation on respondents' part does not appear. It is not unreasonable to assume, however, that inasmuch as the respondents were admittedly financially unable to make payment to the seamen of their wages at that time (310-315), the refusal of the Ellis Island Authorities to accept these seamen followed upon the respondents' inability to give "satisfactory guaranty that all costs of such removal (to Ellis Island), including maintenance charges and damage done by such seamen to the station or place to which removed, * * *" would be paid by the respondents.

Furthermore, in connection with petitioners' contention that the respondents have shown no legal obstacle to the severance of the master and servant relationship, the Court may also note that the respondents could at any time have tendered the amount they conceded to be due into Court, or to other authorities, such as the United States Shipping Commissioner, and simultaneously therewith, to have advised the seamen that their employment was at an end. Had this been done, the respondents' alleged concern for the consequences flowing from the provisions of Section 168, would have been obviated. Such consequences, if real for any purpose, would then have been the concern of the seamen, the depository and the Immigration Authorities; but the shipowner, the respondent, would have discharged both its obligation for the continuance of wages, as well as any possible liability under Section 168. Certainly, this simple and obvious effectuation of the seamen's discharge could not have been the source of complaint by the Immigration Authorities as long as the seamen were not landed ashore or were turned over to the Immigration Authorities.

Any applicability of Title 8, U. S. C. A., Section 168, follows only upon the assumption that the respondents contemplated the discharge of the seamen but were precluded by the provisions of Section 168; and thus it is claimed by the respondents that the alternative method of performance, that of discharge here, was likewise frustrated. Actually, the discussion becomes unimportant if, as was the case, the respondents did not intend to discharge the seamen because they did not have the money with which to pay them. This latter, however, was the real reason for the failure of the respondents to discharge the petitioners and this adequately appears from a reading of the affidavit of Thomas J. Blake, of July 15, 1940, and submitted to the District Court (300-315). From this affidavit, it clearly appears that the reason that the libelants had not been paid, and thus the reason why they had not been discharged was that the respondents did not then have the funds with which to pay them. Not one word appears in this affidavit as to the restrictions of Section 168 that might prevent the making of payment to the men. There is nothing in folios 957 and 1045, cited in this connection by the respondents, at page 15 of their brief, to justify the conclusion that the courts below had found that the men could not be discharged without their consent, because of the order or prohibitions of the Immigration Authorities and Section 168.

It would appear therefore, that there was nothing in Title 8, U. S. C. A., 168, which in fact or theory prevented respondents from the performance of the petitioners' contract with them; that was, to pay them their wages until

they were discharged. The performance of this obligation was in no manner frustrated and remained entirely possible of performance.

Respectfully submitted,

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